

No. PD-0984-19

In the
COURT OF CRIMINAL APPEALS

of the

STATE OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
10/8/2019
DEANA WILLIAMSON, CLERK

THE STATE OF TEXAS, Petitioner

v.

SEAN MICHAEL MCGUIRE, Respondent

**RESPONDENT'S RESPONSE TO
STATE'S PETITION FOR DISCRETIONARY REVIEW**

FROM THE COURT OF APPEALS
FOR THE FIRST JUDICIAL DISTRICT OF TEXAS AT AUSTIN
IN CAUSE NUMBER 01-18-00146-CR

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IDENTIFICATION OF PARTIES

Pursuant to Texas Rule of Appellate Procedure 38.1, a complete list of the names of all interested parties is provided below so the members of this Honorable Court may at once determine whether they are disqualified to serve or should recuse themselves from participating in the decision of this case.

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Trial Court Judge:

The Honorable Brady Elliott

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STATEMENT REGARDING ORAL ARGUMENT

The State has not requested oral argument. Should review be granted,
Respondent requests oral argument.

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THE STATE OF TEXAS, Petitioner

v.

SEAN MICHAEL MCGUIRE, Respondent

RESPONDENT’S RESPONSE

STATEMENT OF THE CASE

Respondent was indicted for the first-degree felony offense of felony murder and the second-degree felony offense of intoxicated manslaughter for causing the death of the same person. (CR1: 12). On March 18, 2014, a jury found Appellee guilty of the offense of murder. (CR3: 562). On May 10, 2016, the First Court reversed Respondent’s murder conviction pursuant to *Missouri v. McNeely*, 133 S.Ct. 1552 (2013). *McGuire v. State*, 493 S.W.3d 177 (Tex. App.—Houston [1st Dist] 2016). The State filed a petition for discretionary review which was refused

on November 2, 2016. *State v. McGuire*, No. PD-0948-16 (Tex. Crim. App. 2016). On February 23, 2018, the trial court granted Respondent's Motion to Suppress Evidence. (CRIII: 45). The State appealed and on August 29, 2019, the First Court of Appeal affirmed the trial court's ruling. *State v. McGuire*, No. 01-18-00146-CR (Tex. App.—Houston [14th Dist.]). The State filed a Petition for Discretionary Review on September 19, 2019.¹ *State v. McGuire*, No. PD-0984-19. Respondent's response is timely filed on or before October 4, 2019. TEX. R. APP. P. 68.9.

STATEMENT OF FACTS

On August 1, 2010, an accident occurred and Respondent called Detective Bryan Leach and Chief Sheriff's Deputy Craig Brady to report that he hit someone or something, but when he looked for what or who it was, he did not see anything. (RR5: 18); (RR6: 83-84); (RR10: 54). Chief Brady contacted the Sheriff's Office dispatch. (RR10: 79). Trooper Devon Wiles and Trooper Alton Tomlin responded to the call. (RR5: 75-76); (RR7: 115).

At a pre-trial hearing held December 14, 2012, Trooper Devon Wiles testified that he did not have a warrant to arrest Respondent and that Respondent was not free to leave after he was placed in a patrol car minutes after Wiles arrived at a Shell gas station where he encountered Respondent the night of the alleged

¹ The undersigned was not actually served with the petition until September 20, 2019.

offense. (Pre-trial RR2: 112-13, 116, 118). Wiles testified that he did not observe Respondent commit an offense in his presence or view. (Pre-trial RR2: 112). At the pre-trial hearing, Wiles testified that Respondent smelled of alcohol, that his eyes were red and glassy, and that he was showing signs of intoxication. (Pre-trial RR2: 93). However, at trial, Wiles testified that when he arrived on scene, he never saw Respondent drink alcohol, there were no open alcoholic drinks, and that prior to Respondent's arrest, Respondent had not lost the normal use of his mental or physical faculties. (RR8: 34, 43-44). At the pre-trial hearing, Wiles testified that there was nothing suspicious about the location where he encountered Respondent and that Respondent was not acting in a suspicious manner. (Pre-trial RR2: 109-10). Wiles testified at trial that he had no evidence of any bad driving facts and Respondent was coherent and his responses were appropriate. (RR8: 42, 45).

Trooper Alton Tomlin testified at the pre-trial hearing, held on December 14, 2012, that Respondent was detained within five or ten minutes after law enforcement arrived on scene and that he was not free to leave. (Pre-trial RR2: 25, 53, 54, 55, 62). Tomlin testified further that he did not have a warrant to arrest Respondent. (Pre-trial RR2: 62). Tomlin testified that at the time of Respondent's arrest, there was no evidence as to who was at fault in the collision. (Pre-trial RR2: 59, 61). Tomlin stated specifically that he did not see Respondent commit

any crime in his presence. (Pre-trial RR2: 75). In addition, at trial, Tomlin testified that he had no evidence of an offense prior to Respondent's arrest. (RR5: 81). Tomlin testified that the location where he encountered Respondent was not a suspicious place. (Pre-trial RR2: 53).

According to dashboard camera video, Respondent was told he was under arrest at 1:01:33 a.m. on August 2, 2010, when Trooper Wiles placed Respondent in handcuffs and read Respondent his *Miranda*² warnings.

ARGUMENT & AUTHORITIES

I. Exigency was litigated in the trial court.

The State Prosecuting Attorney's first ground for review states, "The lower court erred to affirm the suppression of evidence based on the State's failure to establish exigency for Appellee's warrantless arrest under Tex. Code Crim. Pro. art. 14.03(a)(1) when Appellee failed to raise that ground and the trial court did not rule upon it." *See* Petition at 5. It should go without saying that Respondent is not required to raise evidence of exigency in support of Petitioner's argument, despite the State's assertion that "Appellee failed to raise that ground and the trial court did not rule upon it." *See* Petition at 5. In fact, the First Court of Appeals acknowledged that the State had the burden to establish exigency. *See* Opinion at 11. Nevertheless, the issue of exigency has been extensively litigated in this case.

² *Miranda v. Arizona*, 384 U.S. 436 (1966).

As the Court of Appeals correctly noted, the trial court “did not receive any *new evidence*, at the 2018 suppression hearing. Instead, the court reviewed the 2012 suppression-hearing transcript, the 2016 trial testimony, and the parties’ pleadings.” *See* Opinion at 5. It is important to note that the State was not deprived of the opportunity to present evidence at the 2018 suppression hearing. It simply chose not to.

Presumably, the State chose not to present any new evidence of exigency, because there is not any. The two officers that could have established exigency testified in 2012 and 2016 with respect to any exigent circumstances and the State was bound by that testimony. The First Court of Appeals considered the officers’ testimony when it held, in a published opinion, that the blood draw in this case violated *Missouri v. McNeely*, 133 S.Ct. 1522 (2013), because it was conducted without a warrant or exigent circumstances. *McGuire v. State*, 493 S.W.3d 177, 197 (Tex. App.—Houston [1st Dist] 2016).³ The First Court held:

The State lists 24 facts that it argues establish exigent circumstances to justify the warrantless search. These include that the accident occurred late at night, McGuire was no longer at the scene when the police arrived and had to be brought back, the accident site needed to be secured and investigated, and officers needed to manage traffic in the area. Additionally, although prosecutors were on call day and night to assist officers with obtaining a warrant, the magistrates,

³ The State also filed a petition for discretionary review with respect to this issue which was denied by this Court on November 2, 2016. *State v. McGuire*, No. PD-0948-16 (Tex. Crim. App. 2016). The State then filed a petition for writ of certiorari with the United States Supreme Court, but it was denied on May 30, 2017. *Texas v. McGuire*, No. 16-919.

themselves, were not “on call” and would have had to be located. The State notes that, on at least one occasion unrelated to this case, a judge could not be found to issue a warrant. But the evidence also establishes that the officers did not attempt to secure a warrant in this case. Officer Tomlin testified that he took "zero steps" to obtain a warrant to draw McGuire's blood. The State argues that it may have proven difficult to locate a judge to sign a warrant, but, without any effort to do so, the testimony is only speculation.

Having examined the totality of the circumstances, we conclude that the State failed to demonstrate an exigency to excuse the requirement of a warrant.

McGuire, 493 S.W.3d at 197-98.

Additionally, the First Court of Appeals considered the entire record in concluding there are no case-specific facts which establish exigency. After reviewing the record of Respondent’s prior trial, the Court found:

McGuire called his mother from the Shell gas station before he interacted with any police officers, and she drove to the gas station to wait with him. She was available to drive him, should he have been allowed to leave, which meant there was no danger of subsequent driving while intoxicated. Cf. *York v. State*, 342 S.W.3d 528, 536–37 (Tex. Crim. App. 2011) (evidence of defendant’s running vehicle warranted reasonable belief that, if defendant were intoxicated, he would eventually endanger himself and others when he drove vehicle home). Moreover, McGuire waited at the gas station for law enforcement to arrive and agreed to ride with the officers to the location where Stidman’s body was located. There was no evidence that, after the police engaged McGuire, they held any concern that McGuire would attempt to flee. Cf. *Villalobos v. State*, No. 14-16-00593-CR, 2018 WL 2307740, at *6 (Tex. App.—Houston [14th Dist.] May 22, 2018, pet. ref’d) (mem. op., not designated for publication) (concluding that Article 14.03(a)(1) requirements were met on evidence driver “needed to be detained because he had fled scene of accident”).

See Opinion at 12-13.

Quite simply, there is a difference between failing to prove exigency and not being afforded the opportunity to litigate it. Either the State Prosecuting Attorney was not aware of the prior proceedings in which exigency was extensively litigated, or it chose to ignore them. Regardless, review of this issue should be denied. *See* TEX. R. APP. P. 66.3.

II. The Court of Appeals did not err in holding that Texas Code of Criminal Procedure Article 14.03(a)(1) includes an exigency requirement.

The State's second ground for review is, "Alternatively, the lower-court majority erred to hold that Tex. Code Crim. Pro. art. 14.03(a)(1) has an exigency requirement for warrantless arrests." *See* Petition at 11. The State then argues that the holding of the First Court of Appeals is "novel."

Despite the State's assertion, the First Court of Appeals' holding that an exigency requirement exists for a search or arrest conducted in a "suspicious place" under Texas Code of Criminal Procedure Article 14.03(a)(1) is anything but "novel."

In *Swain v. State*, 181 S.W.3d 359 (Tex. Crim. App. 2005), the Court of Criminal Appeals instructed:

Warrantless arrests in Texas are authorized only in limited circumstances and are governed primarily by Chapter 14 of the Code of Criminal Procedure. *Amores v. State*, 816 S.W.2d 407, 413 (Tex. Crim. App. 1991). Article 14.03(a)(1) authorizes the warrantless arrest

of a person found in a suspicious place and under circumstances which reasonably show that an offense has been or is about to be committed. Any “place” may become suspicious when a person at that location and the accompanying circumstances raise a reasonable belief that the person has committed a crime and exigent circumstances call for immediate action or detention by police. *Gallups v. State*, 151 S.W.3d 196, 202 (Tex. Crim. App. 2004), citing *Dyar v. State*, 125 S.W.3d 460, 468-71 (Tex. Crim. App. 2003).

Swain v. State, 181 S.W.3d 359, 366 (Tex. Crim. App. 2005).

Likewise, in *Gallups v. State*, 151 S.W.3d 196 (Tex. Crim. App. 2004), the Court held that exigent circumstances are required to justify a warrantless search in a “suspicious place.” *Gallups v. State*, 151 S.W.3d 196, 202 (Tex. Crim. App. 2004).

The State acknowledges these holdings, but seeks to overturn them because the Supreme Court and, according to the State Prosecuting Attorney, the statute itself do not require exigent circumstances. The State argues that a “public arrest” is constitutional and should not require a warrant. The assertion seems to be, as it was in oral argument, that proof of exigency is not required to “pass constitutional muster.” However, in *Minassian v. State*, the First Court of Appeals explained that while the Fourth Amendment may not require exigency, Texas Code of Criminal Procedure Article 14.03(a)(1) does. *Minassian v. State*, 490 S.W.3d 629, 637 (Tex. App.—Houston [1st Dist.] 2016). This is because of the well-established principle that our State law provides for heightened protections in addition to those provided by the Fourth Amendment. *Id.*; TEX. CONST. ART. I, Section 9.

The State Prosecuting Attorney's argument is a misstatement of the law and ignores current, binding precedent; therefore, review should be denied. *See* TEX. R. APP. P. 66.3.

III. The Issue of Exigency with regard to Petitioner's Blood Alcohol has been extensively litigated and the reviewing Court found no exigent circumstances which would dispense with the warrant requirement.

The State's third ground for review reads, "If Article 14.03(a)(1) has an exigency requirement, it was satisfied here despite that issue not being litigated at trial." *See* Petition at 18. The State then seems to argue that exigent circumstances exist because the integrity of Respondent's Blood Alcohol Content, which was "paramount," could be compromised. *See* Petition at 18. The State then argues that the dissipation of alcohol in the body "supplied exigent circumstances." *See* Petition at 20.

At the trial court and at the Court of Appeals, the Fort Bend County prosecutors never raised exigency with respect to the blood alcohol evidence at the hearing on Respondent's 2018 motion to suppress, nor at the Court of Appeals. *See* Opinion at 10. In fact, the First Court noted, "Here, the State does not argue that the dissipation of alcohol provided the necessary exigency, either *per se* or based on the particular facts of McGuire's arrest. In fact, the State's position is that no exigency requirement exists at all." *See* Opinion at 10.

So, for the first time, the State Prosecuting Attorney injects this argument where it does not belong. There is a reason exigency, with regard to the blood evidence in this case, was not raised by the Fort Bend County District Attorney's Office in the 2018 proceeding. The reason is that whether exigent circumstances existed, with regard to the Blood Alcohol Content evidence in this case, has been litigated for years. The First Court of Appeals held that the blood draw in this case violated *Missouri v. McNeely*, 133 S.Ct. 1522 (2013), because it was conducted without a warrant or exigent circumstances. *McGuire v. State*, 493 S.W.3d 177 (Tex. App.—Houston [1st Dist] 2016).⁴

The First Court of Appeals considered all of the evidence and testimony presented at Respondent's prior trial when it held:

The State lists 24 facts that it argues establish exigent circumstances to justify the warrantless search. These include that the accident occurred late at night, McGuire was no longer at the scene when the police arrived and had to be brought back, the accident site needed to be secured and investigated, and officers needed to manage traffic in the area. Additionally, although prosecutors were on call day and night to assist officers with obtaining a warrant, the magistrates, themselves, were not "on call" and would have had to be located. The State notes that, on at least one occasion unrelated [**37] to this case, a judge could not be found to issue a warrant. But the evidence also establishes that the officers did not attempt to secure a warrant in this case. Officer Tomlin testified that he took "zero steps" to obtain a warrant to draw McGuire's blood. The State argues that it may have

⁴ As discussed above, the State filed a petition for discretionary review which was denied by this Court on November 2, 2016. *State v. McGuire*, No. PD-0948-16 (Tex. Crim. App. 2016). The State then filed a petition for writ of certiorari with the United States Supreme Court, but it was denied on May 30, 2017. *Texas v. McGuire*, No. 16-919.

proven difficult to locate a judge to sign a warrant, but, without any effort to do so, the testimony is only speculation.

Having examined the totality of the circumstances, we conclude that the State failed to demonstrate an exigency to excuse the requirement of a warrant.

McGuire, 493 S.W.3d at 197-98. Clearly, the issue of exigency has been litigated, and extensively, at that. *Id.*

As for the State Prosecuting Attorney's argument that the integrity of Respondent's Blood Alcohol Content, which was "paramount," could be compromised by the dissipation of alcohol "supplied exigent circumstances," ignores the record in this case as well as United States Supreme Court precedent. As the First Court of Appeals correctly stated, "In 2013, the United States Supreme Court ruled that the dissipation of alcohol does not provide a *per se* exigency to relieve the State of the requirement of a search warrant when conducting an unconsented-to blood draw of a DWI suspect. *McNeely*, 569 U.S. at 155." *See* Opinion at 9. The Court continued:

The State could not rely on *McGuire*'s alleged intoxication to argue a *per se* exigency because, after *McNeely*, there is no *per se* exigency for dissipation of alcohol in a suspect's blood. 569 U.S. at 164; *see Donohoo*, 2016 WL 3442258, at *6 (relying on *McNeely* to reject State's argument for warrantless arrest under Article 14.03(a)(1) based on dissipation of suspect's blood-alcohol level, given that officers had testified they never sought warrant); *see also Bell*, 2019 WL 3024481, at *2 n.2 (in connection with holding that, under *Swain*, exigent circumstances must be shown, noting that the United States Supreme Court held, in *McNeely*, that "the natural metabolism of alcohol in the bloodstream does not present a *per se* exigency but must

be determined on a case-by-case basis on the totality of the circumstances.”).

See Opinion at 12. To act as if this is not the current binding precedent or an incorrect statement of the law is concerning.

At best, it seems the State Prosecuting Attorney is unaware of the previous proceedings in which exigency concerning the Blood Alcohol Content Evidence in this case was considered and ruled upon. At worst, it seems the State Prosecuting Attorney wishes this Court to ignore the United States Supreme Court’s decision in *Missouri v. McNeely*, and hold that the dissipation of alcohol is an exigent circumstance in violation of Supreme Court precedent, and without considering the prior proceedings at which this issue was litigated. Because this point lacks merit, review should be denied. TEX. R. APP. P. 66.3.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Petitioner prays that the Court of Criminal Appeals refuse the State's Petition for Discretionary Review.

Respectfully submitted,

/s/ Kristen Jernigan

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 4, 2019, a copy of the foregoing Response to Petition for Discretionary Review was served by efile to the State Prosecuting Attorney's Office at information@spa.texas.gov.

/s/ Kristen Jernigan

Kristen Jernigan

CERTIFICATE OF WORD COUNT

The undersigned hereby certifies that the foregoing document consists of
2,758 words in compliance with Texas Rule of Appellate Procedure 9.4.

/s/ Kristen Jernigan
Kristen Jernigan